THE

AMERICAN LAW REGISTER.

NOVEMBER, 1889.

PUBLIC CHARITIES AND THE RULE OF *RESPONDEAT SUPERIOR.*

I. THE PENNSYLVANIA CASE.

The Supreme Court of Pennsylvania decided, in the case of the Fire Insurance Patrol (*Boyd* v. *Insurance Patrol* (1886), 113 Pa. 269; s. c. (1889), 120 Pa. 624), two questions which it is here proposed to discuss.

These were, first: Is a public charity exempt from the rule of *Respondeat superior;* and second: What is the test or criterion of such a charity?

The Fire Insurance Patrol of the City of Philadelphia was incorporated by the special Act of Assembly of February 17, 1871 (P. L. 59), which, after conferring the usual corporate privileges, provided as follows—

§ 3. The object of the corporation shall be, to protect and save life and property, in or contiguous to burning buildings, and to remove and take charge of such property, or any part thereof, when necessary.

§ 4. The said corporation shall have power to provide suitable places for the transaction of its business, and also to provide a patrol of men, and a competent person to act as superintendent, with suitable apparatus to save and preserve life or property at or after a fire; and the better to enable them so to act with promptness and efficiency, full power is hereby given to such superintendent, and to such patrol, to enter any building on fire, or which may be exposed to or in danger of damage from fire or water, and at once proceed to protect and endeavor to save the property therein, and to remove such property, or any part thereof, during or after such fire; nothing in this Act, however, shall warrant an interference with the orders of the Chief Engineer of the Fire Department, in reference to the ac-

tion of firemen in their duties in extinguishing a fire; *Provided*, that nothing herein contained be construed to affect or interfere with the powers or duties of the officers of the Police Department of the City of Philadelphia, at fires occurring within the limits of the said city.

An action on the case was brought by the widow and minor child of Charles Boyd, against the Insurance Patrol, and two of its employes, to recover damages for having caused his death, and it appeared on the trial, that a few days after a fire, the employes of the Patrol went to the building where it had occurred, to remove the tarpaulins placed by them over goods in the fourth story. These bundles weighed about fifty pounds each, and one of the men threw them from their place in the building to the street below. Boyd, whilst walking beneath, was struck upon the back by one of these bundles, his spine was broken, and he died the next day. The trial Judge held that the defendant company was a charity and entered a nonsuit upon the authority of *Heriot's Hospital* v. *Ross* (1846), 12 Cl. & F. 506, but the Supreme Court reversed the judgment, and directed a new trial, in order that the Insurance Patrol might establish by evidence, additional to its charter, that it was exempt from the operation of the general rule of *Respondeat superior: Boyd* v. *Insurance Patrol* (1886), 113 Pa. 269.

Upon the second trial of the case, it was shown that the Patrol had no capital stock, declared no dividends, made no profits; that it was maintained by the voluntary contributions of insurance companies and insurance agents; that its employes endeavored to save all human life in danger by fire, and all property, whether insured or not, and did so in their attendance at about eleven hundred fires every year. Upon the part of the defendant, it was contended, and here arose the principal question of fact, that the contributing insurance companies were not in any way benefited by the association, apart from the general public; while the plaintiffs endeavored to show by their cross-examination of the insurance men testifying, that the companies profited by the decrease of loss upon insured property through the efforts of the Patrol. In the report of the case (120 Pa. 624), the evidence does not appear, but as printed in the paper books, seems fully to justify the charge of the Judge who presided at the second trial.

The president of the Insurance Company of North America testified—

Q. To what extent were they influenced in making that organization for the purpose of protecting and helping themselves, if any?

A. Not only as citizens, but as a corporation engaged in the business of insurance against fire, they naturally would be benefited by such an organization.

Q. Wouldn't they be very largely benefited, and was not that the great motive for their entering into the company?

A. They would be undoubtedly largely benefited, and it was a very potent motive in the establishment of the Fire Patrol.

Q. Wasn't it a most potent motive?

A. I can only speak for myself.

Q. Do you mean to say that if you had not been the president of the company engaged in insuring against fire, that you would voluntarily have entered the organization of this company and paid out your money?

A. We would not have had a right, as a company, to do so, unless it was for the interest of the Insurance Company of North America.

Q. Has not the practical working of this Insurance Patrol been a very decided benefit and advantage to all the parties who have entered into its formation, in the saving of goods that they have insured at fires?

A. It has.

The treasurer of the Patrol testified—

Q. Is not the practical work of this Fire Patrol such as to save these insurance companies, as a body, from a great deal of losses occurring at fires?

A. There cannot be any doubt about that.

Q. Isn't that the purpose for which these insurance companies, and these agents, contribute anything to support this Insurance Patrol?

A. That is one of the objects.

Q. Isn't that the great and leading object?

A. The charter of the company shows what the objects of the concern are.

Q. But isn't the great and leading purpose, which justifies your company in expending $1,200 a year to keep this up, the fact that thereby your company is saved a great deal of loss on property on which you have insurance?

A. Largely so; yes, sir.

The president of the Patrol, a leading insurance man, testified—

Q. And is not the purpose for which you, as a fire insurance man, got it up, and have helped to carry it on, because it saved your companies from loss on property insured by them from fire?

A. Not alone.

Q. Is not that the leading purpose?

A. That is the leading purpose.

Q. But for that, would you carry it on at all?

A. Yes, sir, I think I would.

Q. You think you would organize this Patrol and support it, although it did not benefit your company at all?

A. I tried to do it before I was ever a member of an insurance company.

Q. And did not succeed?

A. I did not succeed.

Q. So that, until you made it appear to these insurance companies, that they would save money by having a Fire Insurance Patrol like this, you were not able to succeed?

A. After nine years' trial.

Q. Then you satisfied them that they would save money for their stockholders and they went into it?

A. They argued that it would not save money, and that is the reason they would not do it.

Q. But you persuaded them that it would?

A. Yes.

Q. And they finally went into it?

A. Yes, sir.

Q. They saw that it did save their money?

A. Yes, sir.

Q. And they carried it on from that time to this?

A. Yes, sir.

Q. And they intend to carry it on?

A. I hope so.

The secretary of the Patrol testified—

Q. Is it not a fact, that this Patrol Company, in plain English, is nothing but an agency adopted by the fire insurance companies, and the agents of the fire insurance companies, to lessen their losses at fires?

A. That is the main object of it.

The Court, leaving the question of negligence to the jury, charged, that under the evidence the defendant was not a charity and was responsible for the acts of its servants. A verdict and judgment having been obtained by the plaintiffs for $2,500, the case was again removed to the Supreme Court, who held in an opinion by PAXSON, J. (the present Chief Justice), that the Patrol was, in the first place, an auxiliary of the Municipal Government, and, in the second place, that it was a public charity, because within the intendment of the statute of 43 Eliz.; and that the object of the donors of the fund, and not their motive, governed its legal effect. Upon the other branch of the case, the Court held that the Patrol was not liable for the negligence of its employes, because, in the first place, it was an agent for the performance of a public duty, and in the second place, because it was a public charity, whose funds were held upon a trust contributed for a specific purpose.

II. REVIEW OF ENGLISH AND AMERICAN CASES, IN SUPPORT.

The learned Justice, in holding that the Patrol Company, as a public charity, was not liable for its servants' torts, says that the doctrine is "hoary with antiquity, and prevails alike in this country and in England, where it originated as early as the reign of Edward V., and was announced in the Year Book of that period."

Upon examination, however, this early case, cited in argument by the plaintiff in error, is seen to be entirely aside from the question. The following is a translation (substantially correct, it is hoped), from Year Book, 1 Edward V. 4 B., case 10, A. D. 1483.

Assize of rent was brought by one John Worseley, Dean of the Chapter of (St.) Paul's, and by the Chapter, against one Alice Gloss. And the Dean and the Chapter made their plaint of XXIII shillings IV pence of rent, issuing out of three acres of land. Whereupon *Suliard* comes for the defendant, who appears by attorney, and pleads (as before) freehold, and says that as concerns any rent issuing out of one of the acres, he holds the same acre jointly with John At Stile, who is in full life by feoffment of one R. D. who is not named in the writ. And he prays judgment of the writ; and as to this, if it be not so found, he says that he has committed no tort and no disseisin. And as concerns one other of the said acres, he says that he had no estate in the same land upon the day (of the writ) nor ever since, etc., and if it be not so found, *nul tort, nul disseisin*. And as concerns any rent issuing out of the land, he says that there should be no Assise; for he says that one William Saie (predecessor of the plaintiff), Dean of the same Chapter, came in the name of the said Dean and Chapter, at the Feast of St. Michael, and demanded the said rent of one John Maleon, being then tenant, and he paid; and since, at the Feast of St. Michael then next ensuing, the same Dean came as before and demanded the same rent, and the said Dean attempted to make distress; and the same J. M. made rescue; and then the said William Say died and the said Jo. Worseley was chosen Dean. *Without this*, that the said William Say or the said John Worseley, or any others, successors of the said William Say, himself, etc., was seised of the said rent since; in which case the said John Worseley should have his writ of Entry *sur disseisin*, of a disseisin made of his predecessor, and not Assise.

Vavisor (for the plaintiff): As to the first (plea, he replies) sole tenant; without this, that the other (*i. e.* John At Stile) has any estate. And this he is ready (to verify) and the others *e contra*. And as to the other (plea, he replies) tenant as the assise alleges. And this he is ready (to verify), and the others *e contra*.

And as to the third, this plea is not good, for it only amounts to the general issue, *scilicit*, that he (the plaintiff), was never seised so that he could be disseised; and, *for this*, he took issue; as, in writ of Dower, if the tenant shows that the husband of the demandant had merely a life estate, etc., this only amounts to the plea of

Ne Onques Seisi qu' Dower, so that he could endow her, on which the general issue is taken, and so here.

Brian (a Judge): As concerns these pleas: In Assise, the tenant shall have special matter in his plea, and especially when he is to have advantage for pleading this, and it shall be enquired by the assise. And so was the opinion of all the Justices.

Vavisor: For another reason it is not good; for it has shown a payment at the Feast of St. Michael and a payment and receipt at the Feast of St. Michael, and has not shown in what year, etc., so the plea is not good.

Catesby (a Judge): It shall be taken most strongly against him and therefore take your advantage, for it cannot be taken otherwise but that it was in the lifetime of W. S., and then it matters not to him whatever time it happened; so the plea is good enough, notwithstanding.

Vavisor: It is not good for another reason; and that is because a Dean and Chapter cannot be disseised of a rent, for they are always deemed in possession, for one cannot be disseised of a rent, or not disseised, at his pleasure; and therefore the law intends, notwithstanding that the rescue be made, the possession itself and the rent at all times continues in right of the Chapter; and if it shall be so intended, then the assise is maintainable, although there was no seisin had since the rescue; and thus it seems to me the Assise, etc.

Suliard, contra: As it seems to me, the Dean and Chapter resemble an Abbot and his Convent; and if an Abbot and his convent are disseised and then the Abbot is unfrocked or dies; there the Abbot, etc., shall be put to their writ of Entry *sur disseisin*; so it seems to me in this case.

Brian: This case is not like an Abbot or Prior: for as you say, they shall be put to their writ of Entry, etc. For if an Abbot be disseized and die, the Abbot is put to his writ of Entry *de quibus;* but if a Dean and Chapter are disseised, and the Dean dies and another is chosen, the Dean and Chapter shall not (?) have assise; and the reason is because the Dean and Chapter are a single body, and although the Dean is dead, yet the Chapter are persons able to sue, etc., and so is not the convent, etc. And so it is with a Mayor and Commonalty, although the Mayor dies pending any action, yet the writ shall not abate; and so with a Dean, etc. Also, if a Dean makes a feoffment of the Chapter land, that is a disseisin of the Dean and Chapter, and they join in assise; and the reason is because the Dean and Chapter are a body, and nothing done by either of them shall prejudice the Chapter; for, if the Dean, in the name of the Chapter, wishes to command any one to demand a rent, that commandment is not good. And when the Dean himself wishes to demand rent in the name of the Dean and Chapter, it is good; for he should have a command under the seal of the Chapter, or otherwise it is not good; and so it is with a Mayor and Commonalty. But with an Abbot and Convent, the law is entirely different; for if an Abbot makes a feoffment, the successor shall be put to his writ of *Sine assensu Capituli.* And so, therefore, it seems to me that there cannot be disseisin of the Dean, unless there be disseisin of the Chapter. Therefore the right at all times continues; therefore, notwithstanding the rescue, the Dean and Chapter are in possession, therefore of this disseisin they have good cause of assise and the plea is not good. And so was the opinion, etc.

The case is quoted entire, so that it may clearly be seen that the question involved was merely a technicality of ecclesiastical law. The tenant of a Dean and Chapter had made rescue of a distress, the Dean died, and the successor, with the Chapter, brought an assise of *Novel Disseisin.* The defendant objected that the writ should be of entry *de quibus*, as in case of an Abbot or Prior, but the Court held otherwise, because the Dean and Chapter were *un corps entier*, and the disseisin of the Dean was a disseisin of the Chapter, upon which the successor of the deceased and disseised Dean, together with the Chapter, might bring his assise. Fitzherbert, F. N. B. Assise of Novel Disseisin (179) C. & H., and the supplement to Booth on Real Actions, contain the old learning upon this writ; and the cognate writ of entry *de quibus*, is explained in F. N. B. and Booth on Real Actions (174). Says Fitzherbert—

"E. And an Abbot, or a Prior, or Mr. of an hospital, or a Bishop, shall have a writ *de quibus* upon a disseisin of their predecessors of lands, tenements or rent, and the writ shall be such," etc.

Cases of this kind are very frequent in the Year Books. See Bro. Abr. Trespass, pl. 341, an action by the successor of an Abbot for waste; and pl. 380, an action by the successor of an Abbot for ravishment of ward.

So far as the writer has been able to find in the Abridgments and Year Books, these religious corporations appear to have been subject to actions of nuisance, waste and trespass, according to ordinary rules. Thus we find, Mich. 48 E. III 27, an assise of nuisance against the Abbot of Everwike, for diverting the course of a stream, *ad nocumentum*, etc. Trin. 40 E. III 31, pl. 12, the Abbot of Dirland brought trespass against the Prior of S. for trampling down his pasture. Mich. 46 E. III 23, Robert, Dean of St. Peters, and the Chapter, and John Weliot clericus, were sued by the Abbot of Belfast, because they *injuste et sine judicio levaverunt quendam gurgitem ad nocumentum*, etc. In Bro. Abr. Nuisance, pl. 5, Nota, per KNYVET, Chief Justice, a Prior was adjudged responsible for the repair of a bridge. Fitzh. Abr. Waste, pl. 75, an action against an Abbot for waste committed by his predecessor. Fitzh. Nonabilitie 21, Assise of rent against the Abbot of Westminster. In 49 E. III 25, waste was brought against the Prior

of Bekeherwein, for waste committed by a monk. It was there said—

"If a monk of his house commits waste during the Abbot's life, I say that the Abbot shall be charged, because it shall be considered the act of the Abbot himself."

The modern case relied upon by the Court is *The Feoffees of Heriot's Hospital* v. *Ross* (1846), 12 Cl. & F. 507, the facts of which were as follows: In 1623, Heriot bequeathed his residuary estate to trustees to be employed for the "maintenance, relief, bringing up and education of so many poor fatherless boys, freemen's sons of the town, as the means I give shall amount and come to." John Ross, the son of a deceased freeman of Edinburgh, poor and qualified for admission, under certain rules established for the government of the hospital by Dr. Balcanquill, a friend of the testator, in accordance with a provision in his will, was refused admission, and brought suit against the trustees, praying that they should be decreed to pay damages to him for their refusal to admit him to the hospital. It was alleged that the trustees had admitted, in preference to the applicant, certain boys who were not fatherless, and consequently not entitled under Heriot's will. The Scotch Court awarded the plaintiff reparation or damages, but their finding was reversed by the House of Lords, to which the trustees appealed. By the time the case was heard on appeal, however, the boy Ross had passed the age at which he was eligible, viz: ten, so that his claim was for damages solely.

In the House of Lords, it was held, on the authority of *Duncan* v. *Findlater* (1839), 6 Cl. & F. 894, that the trustees (who were sued in their corporate capacity) were not liable, and the reasoning of the Court is set forth quite fully in the quotations contained in the opinion in the Pennsylvania case. It is submitted that the argument shows a misapprehension of the question. Said Lord COTTENHAM—

"To give damages out of a trust fund, would not be to apply it to those objects which the author of the fund had in view, but would be to divert it to a completely different purpose."

Not so. The object which Heriot had in view, was to provide for the education of boys just like John Ross, and the boy's complaint was that his share of the fund was not applied

to that very object. He was admittedly wronged in being deprived of a participation in the fund. The donor intended that he should participate in it. To give him damages from the fund, therefore, would fulfill the intention of the donor, rather than defeat it; which intention was that John Ross, or boys like him, should be benefited by his money. Again, Lord CAMPBELL said (p. 518)—

"The trustees would, in that case, be indemnified against the consequences of their own misconduct."

It is hard to see whence this idea came. Clearly the truth is just the other way. The trustees would be liable to make good to the charity the loss occasioned by their misconduct, and besides might be removed from their office. But Lord Campbell's remark is as inconsequent as if one should say that an ordinary servant is indemnified against his own misconduct by the rule of *Respondeat superior.*

Again, a mere breach of trust by a trustee is not a tort at all. It is a wrong, but not a wrong which could be redressed in a common law action. Professor Pollock, in his Law of Torts, p. 3 (than which no better authority can be found), brings out this distinction very clearly and expressly cites this as an example of what is *not* a tort. It is one thing to say that trust funds shall not be liable for the damages caused by such a breach of the terms of the trust, and another to say that the same funds shall not pay the damages caused by the tort of the trustees.

Adopting the expressions of opinion contained in this case, however, the Pennsylvania Justice adds, that there is not space to discuss the long line of cases in England, and this country, in which the above principle is sustained, it being sufficient to refer to a few of them by name. No other English cases are cited and the writer can find none. The Court, however, cite numerous American cases, but without showing how they support the doctrine.

Riddle v. *Proprietors of Locks* (1810), 7 Mass. 187, adds nothing. There, the proprietors of a canal, bound by their charter to construct a canal of a certain width and character, were held liable for damages sustained by the owner of a raft. So far

from applying *Russel* v. *Men of Devon* (1788), 2 T. R. 667, it distinguishes that case, on the ground that the rule there laid down, does not apply to "regular corporations which have, or are supposed to have, a corporate fund."

In *McDonald* v. *Massachusetts General Hospital* (1876), 120 Mass. 432, a house pupil assumed to set a fractured leg, contrary to the wish of the plaintiff, who wished and asked to be permitted to await the return of the resident physician, then temporarily absent, and the point of the case (irrespective of *dicta*) was that the defendant was not liable for the unauthorized assumption of the student to act as a surgeon. The *opinion* of the Court does, indeed, support the position maintained.

Shelbourne v. *Yuba County* (1862), 21 Cal. 113, held that a county was not liable for the negligence of its physician at the county hospital, because it was merely a *quasi* corporation, acting under a public law for the public benefit.

Brown v. *Inhabitants of Vinalhaven* (1876), 65 Me. 402, following the Massachusetts law on the subject of unincorporated municipalities, held that the "town," as a *quasi* corporation, was not liable, except by express statutory provisions. *Mitchell* v. *City of Rockland* (1860), 52 Me. 118; *Richmond* v. *Long* (1867), 17 Grat. (Va.) 375; *Murtaugh* v. *St. Louis* (1869), 44 Mo. 479; *Hamilton County* v. *Mighels* (1857), 7 Ohio St. 109; and *Maximilian* v. *Mayor* (1875), 62 N. Y. 160, are to the same effect. *Ogg* v. *Lansing* (1872), 35 Iowa 495, held that a city, exercising legislative functions, was not liable for the negligence of its officers, while *Patterson* v. *Pennsylvania Reform School* (1880), 92 Pa. 229, it is submitted, involved an entirely different question.

From this review of the cases cited by the Pennsylvania Court, it will be seen that, so far as authority goes, the judgment depends upon *Heriot's Hospital* v. *Ross* (1846), 12 Cl. & F. 507, and this, upon examination, is found to rely upon *Duncan* v. *Findlater* (1839), 6 Cl. & F. 894, which was an action against the trustees of a turnpike road, for damages caused by negligence in the repaving of the road. The statute under which the trustees were appointed, provided that the tolls collected should be applied to making, repairing and im-

proving the roads and bridges, and the extinguishment of the debt, and to no other purpose whatsoever. Lord COTTENHAM said—

"It is impossible to suppose that the framers of this statute contemplated that any part of this fund would be appropriated for the purpose of affording compensation for any act of the persons who might be employed under the authority of the trustees."

Which argument, upon the construction of a statute and the intention of its framers, he afterwards applied in the case of *Heriot's Hospital*, to what is certainly very different, to wit: the intention of the founder of a trust. The accident seemed to have been caused by the default of an independent contractor, and the case might well have been decided on that ground, and in fact nothing more was decided, according to Mr. Justice BLACKBURN; *Mersey Dock Trustees* v. *Gibbs* (1886), L. R. 1 H. L. 117. The principle enunciated by the Court was, indeed, that the trustees of the turnpike road having been incorporated for a public purpose, were not subject to the rule of *Respondeat superior*, but the cases cited by the Court seem generally, however, to involve the question of the personal liability of the trustees. The question of the liability of municipal, or *quasi* municipal corporations, in such cases is entirely too complicated to be decided off-hand. There is probably no subject more confused by contrary decisions, as may be seen by a reference to Dillon on Municipal Corporations, Chapter XXIII. and § 983. As concerns the case of *Boyd* v. *Insurance Patrol*, however, it is unnecessary to discuss this branch of the subject, as both the *Heriot's Hospital* case and the *Insurance Patrol* case were rested on what Mr. Justice PAXSON, in the latter, calls the "higher ground."

Nevertheless, it is worth while to note the later criticism of the *dictum* favoring this higher ground, contained in *Duncan* v. *Findlater*. It is styled by Lord WESTBURY in *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 126, a misapprehension which would lead to very mischievous consequences.

"It is by no means true," it was said, "that a court of equity is able to protect the property of beneficiaries against the acts of trustees. If trustees alienate property for valuable consideration to a person who pays that consideration without notice of the trust, the interest of the beneficiaries suffers from that act; and it would be a very unreasonable and a very mischievous thing, if, in the case of corporations

dealing with the public, or with individuals, such corporations should, by any conduct in respect to property committed to their care, give a right of action to individuals, that such individuals should be deprived of the ordinary right of resorting for a remedy against the body doing or authorizing these acts, and should be driven to seek a remedy against the individual corporators, whose decision or order in the name of the corporation may have led to the mischief complained of. It is much more reasonable in such case, that the trust or corporate property should be amenable to the individual injured, because there is then no failure of justice, seeing that the beneficiary will always have his right of complaint and his title to relief against the individual corporators who have wrongfully used the name of the corporation."

III. RESPONDEAT SUPERIOR.

We start with the rule of *Respondeat superior*, in accordance with which a charity is liable for its servants' torts, unless it can show itself to be an exception. Take the case of an action brought against a free hospital for the negligence or malpractice of its surgeon. It must be admitted, aside from adjudged cases, that three out of every four laymen would at first blush to think that the action should not lie, if due care had been exercised in the selection of the physician. At least four reasons would be given.

First. That the hospital being free, the patient pays nothing for medical attendance, and, therefore, for lack of consideration, should recover no damages for his injury. The error here, it seems to me, lies in applying theories of contract to a case of tort. The doctrine of consideration has nothing to do with it. He who undertakes to do a thing, makes care and skill his duty, and is liable for default. From the time of *Coggs* v. *Bernard*, it has been clear law that an action for damages lies for negligence in the execution of a gratuitous undertaking. If a consideration is requisite, it may be implied from "the trust reposed in the defendant, to which he has concurred in his assumption," or to apply more recent theories of the doctrine of consideration, in the case supposed, though the patient pays no money, yet he pays with his leg.

Second. That the charity has no funds wherewith to pay the damages. This argument was used in the Patrol case, and appears to have originated in *Russell* v. *Men of Devon* (1788), 2 T. R. 667, a case of an action by an individual against the inhabitants of a county—a *quasi* corporation. As applied to a corporation like the Patrol company, it has no application.

No man can plead his poverty or insolvency in bar of an action, and corporations cannot do so; yet the argument amounts to this. The question, however, has been decided in more than one case in England, adversely to such defence, and doubtless American authority may be found: See *Levingston* v. *Lurgan Union* (1868), I. R. 2 C. L. 202; *Southampton and Itchin Bridge* v. *Southampton* (1858), 8 E. & B. 801; *Kendall* v. *King* (1856), 17 C. B. 483.

Third. That the funds of the charity are affected with a trust for the benefit of the objects designated by the donor or contributors, which is the principal ground of the decision in *Heriot's Hospital* v. *Ross* and *The Insurance Patrol* v. *Boyd*. But, carry that argument out to its logical result, and it should apply to the contracts of the trustees as well, as pointed out in *Mersey Docks* v. *Gibbs*. I suppose that if the trustees of a hospital, in building a new ward, should deprive the adjoining land of its lateral support, or damage a party wall, the owner thus injured, could recover damages from the hospital as in ordinary cases.

Moreover, the intention of the donor should not be considered an all-sufficient reason, and prevail to an unlimited extent. Undoubtedly the founder of a charity does not direct the payment of damages caused by the torts of its managers. He does not contemplate that such cases will arise, and naturally does not make provision for them. To say, however, that his bare intention, or failure to make such provision, shall subvert the ordinary rules of law, carries the doctrine of trusts far beyond the law of spendthrift trusts, as it exists even in Pennsylvania: See Gray on Restraints on Alienation, § 212. In spite of the remark of the learned Justice, 120 Pa. 649, it is hard to think that a trust is invested with such "sacredness." Property, in whosesoever hands it may be, must be subject to the ordinary liabilities, unless expressly excepted by statute.

A fourth reason is sentimental, rather than legal: that a charity endeavoring to do good, founded by philanthropy and maintained for the well-being of the community, is not liable for failure to accomplish its end. This involves the question, Does intention to do good excuse doing harm? Let us discard the doctrine of the "criminalists" on the one hand, that lia-

bility is based upon personal fault, and, on the other, the theory that a man acts at his peril. Let us adopt the more scientific rule, that the liability for unintended harm, is determined by what would be blameworthy in the average man. (See Holmes on Common Law; Lectures III and IV.) The decision of the question must be left to the jury, remembering that liability to an action does not necessarily import wrong-doing, and that negligence, "the absence of care according to the circumstances," signifies, in the commission of an act, such clumsiness or unskillfulness, that injury is caused to another.

The good Samaritan, when he found the man wounded by the thieves, poured oil and wine into his wounds and bound them up. Suppose he had, with the best intentions, but without the requisite knowledge and skill, amputated a limb which was but slightly injured and needed only nature's cure, the patient might well have prayed to be saved from his friends. Such actions are not often brought, because, in the opinion of mankind at large, they would savor of ingratitude, and *noblesse oblige;* this does not prove that they cannot be brought, and while the argument is proper enough for the jury, the defendant cannot call for binding instructions.

Upon the other hand, our hospital opens its doors to the sick and injured, and invites them to come in. It does not guarantee health and recovery, but it does promise careful and skillful attendance. It places its surgeons by its beds and puts in their hands the power to do good or evil. A patient goes to the *hospital,* and not to Doctor A. or Surgeon B., whose name, perhaps, he does not know. But he does know the hospital, and has a right to expect to receive intelligent assistance. It is no answer for the managers to say that they have exercised due care in selecting their physicians, for such a plea would abolish the rule of *Respondeat superior* in all cases: Holmes on Common Law, p. 6. The negligent physician is liable over to the hospital for the damages incurred through his default, and it is more reasonable to allow the injured plaintiff his action against the master, than to restrict him to his remedy against the servant.

IV. AUTHORITIES OPPOSED TO THE PENNSYLVANIA CASE.

In *Gibbs* v. *Trustees of the Liverpool Docks* (1858), 3 H. & N. 164, the plaintiffs were the owners of the cargo of a vessel which arrived in Liverpool, where the defendants were the proprietors of a dock constructed under the authority of an Act of Parliament. The defendants collected from vessels using the docks, certain tolls, which they were bound to apply to the maintenance of the dock, so as to keep it safe for vessels entering the same. The declaration averred that the defendants had funds in their hands, received from tolls, sufficient for the maintenance of the docks in good repair, but that the defendants did not take reasonable care, and negligently, with knowledge of the fact, permitted the entrance to the dock to become obstructed by mud, upon which the plaintiffs' vessel struck, and was thereby, with its cargo, damaged. Said COLERIDGE, J., in the Exchequer Chamber—

"The case of *Parnaby* v. *Lancaster Canal Co.* (1839), 11 A. & E. 223, establishes that the defendants would have been responsible under such circumstances, if they had had a beneficial interest in the tolls when received, and we do not think the principle of that decision inapplicable, because the defendants, in the present case, received the tolls as trustees."

The judgment of the Exchequer (1856), 1 H. & N. 439, was accordingly reversed, and the demurrer to the declaration overruled. Upon the trial, the jury found a verdict in favor of the plaintiffs.

About the same time, a similar action was brought by Penhallow, the owner of the vessel, against The Mersey Docks and Harbor Board, formerly styled the Liverpool Docks, and at the trial the jury were charged that, if the defendants, by their servants, had the means of knowing the state of the dock, and were negligently ignorant of it, the verdict should be for the plaintiffs. To this charge the defendants excepted, and upon a verdict in favor of the plaintiffs, the case was removed to the Exchequer Chamber, where the charge was sustained: (1861) 7 H. & N. 329. Both cases were then removed to the House of Lords (1864, 1866), and are reported in L. R. 1 H. L. 93. In delivering his judgment, which was founded upon *Parnaby* v. *Lancaster Canal Co.* (1839), 11 A. & E. 223, Lord Chancellor CRANWORTH said—

"The only difference between that case and those now standing for decision, is that here the appellants, in whom the docks are vested, do not collect tolls for their own profit, but merely as trustees for the benefit of the public. I do not, however, think that this makes any difference, in principle, in respect to their liability. It would be a strange distinction to persons coming with ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not."

Lord WENSLEYDALE, it is true, considered the question as ruled by the prior decision of the Lords in *Jones* v. *Mersey Dock Trustees* (1865), 11 H. L. C. 443, in which it was held that the same defendants were liable to be rated as occupiers, though their occupation of the docks was not for private benefit, and that therefore their liability for negligence, as their responsibility for taxes, was that of private, and not public corporations. Lord WESTBURY disagreed with Lord WENSLEYDALE upon this point, and decided the case upon general principles, in opposition to the *dicta* in *Duncan* v. *Findlater*, and such was the opinion of the Judges who were summoned. Professor Pollock, in his work on Torts, page 51, gives the result of this case in the following words—

"Where bodies of persons, incorporated or not, are intrusted with the management and maintenance of works or the performance of duties of a public nature, they are in their corporate or *quasi* corporate capacity responsible for the proper conduct of their undertakings no less than if they were private owners; and this whether they derive any profit from the undertaking or not."

The Irish Exchequer Chamber reached the same conclusion in *Levingston* v. *Lurgan Union* (1868), I. R. 2 C. L. 202.

In *Glavin* v. *Rhode Island Hospital* (1879), 12 R. I. 411, the plaintiff, who had been a patient in a hospital administered as a charity, brought an action on the case to recover damages for unskillful and negligent surgical treatment. The plaintiff, while at the hospital, paid eight dollars a week for his board, washing, etc., but the surgical services were rendered free. The Court directed a verdict for the defendant, on the ground that the hospital, being the dispenser of a public charity, and dependent for support upon voluntary contributions, was by public policy exempt from liability for the negligence of its physicians. The whole subject was fully discussed by DURFEE, C. J., who, after reviewing the English cases, said—

"Where there is duty, there is *prima facie* at least, liability for its neglect; and when a corporation, or *quasi* corporation, is created for certain purposes which cannot be executed without the exercise of care and skill, it becomes the duty of the corporation, or *quasi* corporation, to exercise such care and skill; and the fact that it acts gratuitously, and has no property of its own in which it is beneficially interested, will not exempt it from liability for any neglect of the duty, if it has funds or the capacity of acquiring funds for the purposes of its creation, which can be applied to the satisfaction of any judgment for damages recovered against it."

The Supreme Court therefore ordered a new trial.

Levingston v. *Guardians of Lurgan Union* (1868), I. R. 2 C. L. 202, was an action against the Poor Law Guardians of a Union, for injury caused to the plaintiff by making a sewer and discharging sewage from the workhouse into a stream to the use of which the plaintiff was entitled. The case of *Mersey Docks* v. *Gibbs* was followed, and supported, in an able discussion of the subject by the Irish Exchequer Chamber.

It is of course true, as noted by Mr. Justice PAXSON, that in the discussion of the ratability of the Mersey Docks Trustees as occupiers under the Act of Parliament (11 H. L. C. 465), the argument did not turn upon the question whether the docks were charities or not. Those cases were cited only by way of analogy. Neither are the Dock cases here cited as directly decisive of the question chiefly involved in the case of the Fire Insurance Patrol. The Dock cases, and similar decisions, do show, however, that the ground of decision taken in *Duncan* v. *Findlater*, *Heriot's Hospital* v. *Ross* and *Boyd* v. *Insuram. Patrol* are incorrect, or at least inconsistent with principle.

V. LIABILITY OF A CHARITABLE CORPORATION.

To sum up the result upon the main question, Is a charitable corporation liable for the torts of its servants? We find it said to be answered in the negative by one English case, *Heriot's Hospital* v. *Ross*, upon grounds untenable under the English decisions; and by a Massachusetts case, *McDonald* v. *Massachusetts Hospital* (1876), 120 Mass. 432, which may indeed be easily distinguished, as above stated; by a Maryland case, *Perry* v. *House of Refuge* (1884), 63 Md. 20, following *Heriot's Hospital* v. *Ross*; while an affirmative answer is given in the carefully considered case of *Glavin* v. *Rhode Island Hospital* (1879), 12 R. I. 411, and it is submitted that this view is supported

by general principles of law. At all events, the question can scarcely be considered as settled in Pennsylvania by the Insurance Patrol case, which may more safely be rested upon other grounds.

Upon the second branch of the case it is conceived little need be said. The Court laid it down that the true test of a charity is the purpose; that is, the destination to which the money is to be applied, not the motive of the donor. It may be that Mr. Binney's celebrated phrase, "free from the stain or taint of every consideration that is personal, private or selfish," is rhetorical, rather than exact, and it is true that the Courts have frequently recognized as charities, foundations established "to immortalize their founders," but never before has an institution, founded and maintained for the express purpose of benefiting its contributors pecuniarily, been held to be a charity.

The evidence quoted above showed most conclusively that these fire insurance companies paid their money to support the "Fire Insurance Patrol," for the express purpose of reducing their losses by fire, and that they derived substantial benefit from its operation. The learned Judge presiding at the trial, ALLISON, P. J., well charged—

"It seems to me, that whenever a corporation claiming to be a charity, puts itself in the position before the law, of saying, that however commendable the saving of life and property may be, yet that the great object of its existence is to make money for some persons, and that they are to receive a profit and benefit growing out of the operations of that corporation, whether it be directly or indirectly, that moment all claim to its right as a charity, such as the law may possibly protect, passes out of the case."

"It would be idle to say," Mr. Justice PAXSON admits, "that the insurance companies do not expect to diminish their losses, by their support of the Insurance Patrol. But has the private citizen, who contributes to a fire company, any higher motive?"

The distinction and the true test is a very simple and obvious one. In the language of the Court in *Donohugh's Appeal* (1878), 86 Pa. 306, is there "some mixture of private or individual gain," or, in other words, is there an expectation of direct pecuniary profit?

Indeed, in the very recent case of *Philadelphia* v. *Women's Christian Association* (1889), 125 Pa. 572, *Donohugh's Appeal*

was approved, and the present Chief Justice stated the rule almost in the very words used above, that an institution claiming exemption from taxation, as a public charity, should be "free from any element of private or corporate gain."

How any one can say that this element is not to be found in the Fire Insurance Patrol Company, is difficult to perceive.

JOHN MARSHALL GEST.

Philadelphia.

RECENT AMERICAN DECISIONS.

Supreme Court of Indiana.

STATE EX REL. WORRAL v. PEELLE.

The Legislature possesses only such power as the people have delegated to it by the Constitution. A written Constitution is a limitation upon the power of government in the hands of the Legislature.

The Legislature has no power to create a general State office and fill it by election, unless especially empowered so to do by the Constitution.

A clause in the Constitution, that "All officers, whose appointments are not provided for in this Constitution, shall be chosen in such manner as now is or hereafter may be prescribed by law," does not of itself empower the Legislature to elect or appoint a general State officer.

The right to fill vacancies by appointment in all State offices of a general character, is vested in the Governor.

The electors of the State have a right, of which they cannot be deprived, to fill all State offices of a general character, by election.

The attempt of the Legislature to fill an office newly created, by election, being void, the Governor may disregard such attempt and fill the vacancy by appointment.

Harris, Beveridge and Michener, Attorney-General, for appellant.

McCullough & Harlan for appellee.

OLDS, J., November 7, 1889. The relator filed his information to obtain possession of the office of Chief of the Indiana Bureau of Statistics, to which office he claimed to have been duly appointed by the Governor of the State, and for the removal of the defendant, William A. Peelle, Jr., who, it is alleged, had usurped and illegally continued to hold such office. The defendant demurred to the information in the Court below, stating two causes of demurrer: *First*, that the complainant does not state facts sufficient to constitute a cause of action; *Second*, that the plaintiff has not legal capacity to sue.